

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
GREG NEWBERRY D/B/A PAHSIMEROI)	File Nos. 0000614503, 0000614541,
AGRICULTURE)	0000614479, 0000590113
)	
To Modify 800 MHz Radio Stations)	
)	
and)	
)	
CHEVAS PEAK ASSOCIATES LLC)	File No. 0000590077
)	
To Operate an 800 MHz Business Radio Pool)	
Station)	

ORDER ON RECONSIDERATION

Adopted: February 18, 2004

Released: February 19, 2004

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

1. *Introduction.* In this *Order on Reconsideration*, we address a February 6, 2003 Gem State Communications, Inc. (Gem State) petition for reconsideration of the Public Safety and Private Wireless Division¹ decision to dismiss as moot the Gem State informal petition to deny the above-captioned applications.² Specifically, Gem State challenges the Division's decision to take such action without first investigating the Gem State allegations that the applications contained misrepresentations and lacked candor. For the reasons that follow, the petition for reconsideration is denied.

2. *Background.* On December 3, 2001, Gem State filed an informal petition to deny the above-captioned applications for authorization to operate numerous mobile units for internal communications. Gem State alleged that Greg Newberry d/b/a Pahsimeroi Agriculture (Newberry) and Chevas Peak Associated LLC (Chevas Peak) intended to use the mobile units for commercial, rather than internal purposes.³ Additionally, Gem State alleged that the applications failed to demonstrate a need for the number of requested mobile units. Accordingly, Gem State argued that the applications should be dismissed.⁴ Moreover, Gem State argued that there should be a Commission investigation inquiring whether Newberry and Chevas Peak abused the Commission's processes by filing the above-captioned

¹ The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division (Division). See Reorganization of the Wireless Telecommunications Bureau, *Order*, FCC 03-0291, ¶ 2 (rel. Nov. 25, 2003).

² See Applications of Greg Newberry d/b/a Pahsimeroi Agriculture, and Chevas Peak Associates LLC, *Order*, 18 FCC Rcd 198 (WTB PSPWD 2003) (*Order*).

³ Informal Petition to Deny at 4-5.

⁴ *Id.* at 1-2, 4.

applications.⁵ On November 30, 2001, prior to the filing of the informal petition to deny, the Chevas Peak application was granted.⁶ Chevas Peak subsequently requested that the authorization be cancelled.⁷ Subsequent to the filing of the informal petition to deny, Newberry canceled each of the four licenses that were the subject of the above-captioned modification applications.⁸ The modification applications of those cancelled licenses were then dismissed.⁹ Due to the Chevas Peak and Newberry license cancellations, the Division, on January 16, 2003, dismissed the Gem State informal petition to deny as moot.¹⁰ On February 6, 2003, Gem State filed a petition for reconsideration.

3. *Discussion.* Gem State argues that the aforementioned license cancellations did not render moot the question of whether there were misrepresentations and lack of candor on the part of Newberry and Chevas Peak during the application process.¹¹ Therefore, it requests reconsideration of the Division's decision to not initiate an investigation into the question of the Commission's processes were abused by Newberry and Chevas Peak.¹²

4. The Commission defines lack of candor as concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive.¹³ The standard for misrepresentation is a false statement with intent to deceive.¹⁴ The Commission relies heavily upon the honesty of its applicants and may disqualify an applicant who provides misrepresentations or lacks candor in its dealings with the Commission during the licensing process.¹⁵ The Commission has held that abuse of process is a broad concept that includes use of this agency's processes to achieve a result that the process was not intended

⁵ *Id.* at 2.

⁶ Call Sign WPTR692.

⁷ See File No. 0001027050. The Division's Licensing Technical Analysis Branch granted Chevas Peak's cancellation request on September 13, 2002.

⁸ See File Nos. 0000795775, 0000855253, 0000912534, 0000912535.

⁹ File Nos. 0000614503, 0000590113, 0000614479, and 0000614541 sought to modify the licenses for Stations WNHD723, WNHD749, WNHD722, and WNHD754, respectively and these applications were dismissed on April 19, 2002, March 6, 2002, Jan. 29, 2002, and June 5, 2002, respectively. See, e.g., File No. 0000614541, Automated Letter Ref. No. 1389051, dated April 19, 2002 ("Your cancellation request has been granted; therefore, this application is dismissed and no further action will be taken."). See also File No. 0000614479, Automated Letter Ref. No. 1263419, dated Jan. 29, 2001 ("Rule 90.179 indicates that above 800 MHz only SMR, PCP, and LMS licensees are allowed to share on a for profit basis. Your request to provide for profit service is inconsistent with this Rule. Further you are not eligible in the Industrial/Land Transpiration Pool. Therefore the application is defective, and hereby dismissed.").

¹⁰ *Order*, 18 FCC Rcd at 199 ¶ 2.

¹¹ Petition for Reconsideration at 5-6.

¹² *Id.*

¹³ See *Fox River Broadcasting, Inc., Order*, 93 FCC 2d 127, 129 ¶ 6 (1983) (Fox River); see also *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 393 (D.C. Cir. 1993).

¹⁴ See *Fox River, Order*, 93 FCC 2d at 129 ¶ 6.

¹⁵ See *In Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000), and cases cited therein.

to achieve.¹⁶ It only considers the possibility of sanctions in egregious cases where the abusive nature of the action is clear.¹⁷

5. Gem State argues that misrepresentation and lack of candor on the part of Newberry and Chevas Peak can be inferred by the number of requested mobile units¹⁸ and the business descriptions that are listed on certain state filings.¹⁹ Although we acknowledge the gravity of Gem State's allegations, we also note that they are based on inference and speculation. As a general matter, the Commission seeks objective, factual evidence of falsehood when it chooses to pursue allegations of misrepresentation and lack of candor.²⁰ Because Gem State's allegations are speculative and lack the necessary foundation for us to commence an investigation, we continue to believe that no further actions are warranted given the record thus proceeding. As a result, we will deny Gem State's petition for reconsideration. Nonetheless, so as to be clear to Newberry and Chevas Peak, we will not hesitate to scrutinize applications that merit further attention and, in those instances, request additional information as appropriate to ensure that the letter and spirit of the Commission's licensing rules and policies are being followed.

¹⁶ See Ronald Brasher, *Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing*, 15 FCC Rcd 16326, 16331 ¶ 9 (2000) (Brasher).

¹⁷ See, e.g., *Litigation Recovery Trust, Memorandum Opinion and Order*, 17 FCC Rcd 21852, 21857-58 ¶ 11 (2002).

¹⁸ Gem State suggests that entities that seek mobile communications for private, internal use typically do not file applications such as those captioned above, which, according to Gem State, request a mobile unit authorization total that exceeds the Part 90 limits for private land mobile radio (PLMR) communications. See *Informal Petition to Deny* at 4; see also *Petition for Reconsideration* at 5.

¹⁹ Gem State, for example, argues that one can infer from Chevas Peak's description of its business as "communications" in its State of Utah's Certificate of Assumed Business Name that it was the intent of Chevas Peak to use its Part 90 mobile units, not for internal communications as described in the above-captioned application, but, rather, for commercial mobile radio service. See *Informal Petition to Deny* at 5-6; see also *Petition for Reconsideration* at 4. Although Gem State may be able to only infer deceitful intent from the business description that is listed in this state filing, we believe that one can also infer the honest intent to provide Part 90 PLMR services.

²⁰ For example, in Brasher, *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing*, 15 FCC Rcd at 16332 ¶ 10, the Commission designated multiple PLMR station applications because there existed a factual basis to conclude that the purported applicants had either died prior to the date their signatures appear on their respective applications, or the applicants denied that they had applied for a license. Unlike here, facts were presented that were mutually inconsistent with the information submitted in the various applications, thus raising issues of misrepresentation and lack of candor. See also, e.g., *Family Broadcasting, Inc., Order to Show Cause and Notice of Opportunity for Hearing*, 16 FCC Rcd 4330, 4335-36 ¶ 15 (2001) (Commission agent inspected authorized site and found no transmitter).

6. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.106(b) of the Commission's Rules, 47 C.F.R. § 1.106(b), the petition for reconsideration filed by Gem State Communications, Inc., on February 6, 2003 IS DENIED.

7. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
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